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CHANDELOR *v.* LOPUS.

M^R. BIGELOW, in the preface to his "Law of Fraud," says : "What shall be said of a treatise on the law of fraud which makes no mention of Chandelor *v.* Lopus? . . . The truth is, Chandelor *v.* Lopus — and this case is taken as an illustration of a class that has had its day — was one of the few decisions upon an important point." The case, he says, was *imperfectly reported*.

It is certainly surprising how frequently in the United States this case has been misunderstood, and that by men in the highest position it has been assumed to decide a point that was not in the case, and could by no possibility have been there decided. On the one side, the supposed decision which absolutely shocks all sense of common honesty has been accepted, gloried in, and adhered to. On the other, the grossness of the fraud involved in and sanctioned by the supposed decision caused its rejection, and by a true judicial instinct the annunciation of a rule which really is the true one on the subject to which the case belongs, if not implicitly contained in the case. The same misfortune has occurred with another case, — *Pordage v. Cole*. There, even English judges have been misled, — a thing perhaps impossible but for the fading away of the knowledge of the art of pleading, which was the only thing involved in either case, — and, until Lord Bramwell pointed it out, nobody seems to have noticed or ventured to assert that this was all that was decided ; while with many — not all — both these cases have been persistently treated as deciding great questions on the law of contract, and fraud connected with contract, when, in fact, a point of pleading only was decided ; and one of those was wrong, as every form-book proves.

Singularly enough both cases are admirable texts for dissertations on the most important practical questions of every-day commercial life, while neither decided anything that can really be called important, and one of them, as I have said, was certainly wrong.

It so happens that both cases were decided on identical similar points : one on demurrer ; the other in error on a motion in arrest of judgment, — which raises the same points as a general demurrer, that is, objections that are substantial and not merely

formal. Stephen's, 96. *Chandelor v. Lopus* was on a motion in arrest of judgment. To this I confine myself. No one concerned in the decision ever knew, therefore, what were the facts, or the merits, or the evidence. There was but this single point: *Does this averment show a cause of action?*

As happened in the commentaries on *Pordage v. Cole*, this has been generally overlooked, and it has been supposed by some, who ought to have known better, that the case had decided that, without the use of a cabalistic word, or some special form of words, a contract could not have been made.

In *Chandelor v. Lopus* all that was decided was this: that the legal effect of an alleged contract or conduct must be stated, and not evidence from which that effect can be inferred, or by which it may be proved. And this, though the fact, if used as evidence, may be such that the inference is inevitable that a cause of action is proved. How, then, can it have been that men of the capacity and in the position of Chief-Justice Gibson of Pennsylvania, in *Borrekens v. Bevan*, 3 Rawle, 44, and Chief-Justice Parker of Massachusetts, in 13 Mass. 143, made such absurd mistakes?

It is impossible to assign any other reason than that both were not familiar with the despised art of the pleader.

The divergence of the deductions from the same premises is most characteristic.

Now, what is it that both these eminent men thought was decided, and which one accepted and gloried in, and the other rejected, refusing to be bound by any such law? A jeweller dealing with his customer exhibited a stone and *affirmed* it to be a bezoar stone. The purchaser bought it for £100, and it was not a bezoar stone. There is no liability in that case, says one. There is, says the other. Observe. There is no fraud or intentional false statement. But there was a statement of a fact connected with a thing being sold; it was a fact peculiarly within the province of the seller and unknown to the buyer, and which he had a right to suppose the seller knew. It was of an occult quality of a substance, constituting the very essence of the substance.

The purchaser evidently relied on the statement, and presumably was known to have relied on it. All this is implicitly contained in the averment as matter of evidence or proof.

What makes C. J. Gibson's mistake the more remarkable is that

his attention had been drawn to the true point. He says, parenthetically, that no particular form of words is necessary to create a contract, even the contract of warranty, and that it is for the jury to say what is the effect and meaning of verbal statements, conversations, or negotiations; and yet he denies that such conversations under such circumstances between such persons afford any evidence to justify the inference that the jeweller undertook or agreed, or contracted or promised, in consideration of the purchase of the stone and payment of the price, that the stone bought was really what he described it to be: that is, that the chattel was what he had said it was. Parker, C. J., simply refused to accept any such sanction to swindling as the law of his State.

The point decided in *Chandelor v. Lopus* no doubt has been confused with the remarks or reasons attributed by the reporter to the judges who gave judgment. Whether they ever uttered them is more or less uncertain. Rarely do two reports of the same case agree in the reasons, or, as we call them, the opinions of the judges. Sometimes one reporter finds a point decided which is omitted by another. Sometimes a fact stated by one explains a decision stated by another. Here, as has been said, the question arose in error and on a judgment on demurrer, and the only possible point was, Did the allegation show a cause of action? It certainly did not. On the other hand, it showed evidence which certainly was sufficient to prove a cause of action. The test of the inefficiency of that averment is, that had issue been joined the plaintiff would be entitled to a verdict if he proved the facts averred. And it would not have availed had it been proved that the averment was qualified by there having been an express request and refusal to warrant, by an admission that the purchaser was not deceived, but took his chance, or that he did not rely on the averment, but believed it was untrue when he heard it, or that the thing turned out to be a diamond worth £1,000, instead of being a bezoar stone worth £100.

Put the case in legal form in either of the two possible aspects it could assume to create a liability, and all these things become material. Was there deceit? — *i.e.*, successful fraud and damage resulting, — or was there a contract, in which case fraud or knowledge or deception become immaterial?

My object is to redeem the famous case from being relegated to the rubbish of the past, and show it up as a specimen of as per-

fect law as can be produced at this day; and which, as a point of law, must last as long as a claim or a defence must be stated. For it really decides two things. One is a rule of pleading, which in modern times is thus stated, — that things must be stated according to their legal effect. Evidence cannot be stated either in declaration or plea, because the issue would be confined to the existence of that evidence, and its effect would be an immaterial matter. The other point decided is that a mere statement, unless it was made as a contract or was made fraudulently, is immaterial, and if either of these is relied on they must be pleaded accordingly. The unhappy result of the misapprehension, that because an untrue statement of a fact did not, without more, necessarily show a state of facts on which liability was a necessary consequence, therefore it could not be evidence to establish a liability, is exhibited in *Boyd v. Wilson*, 3 Weekly Notes of Cases, 521, where it was decided that a sale by sample does not create a contractual liability if the bulk is not similar to the sample. Nothing can be a more logical deduction; but the absurdity of the result should have induced a suspicion that the fallacy lay in the premises. If statements of facts, even such as they were in *Chandelor v. Lopus*, and between parties holding the relative positions as in that case, are not evidence to authorize an inference of an intent to warrant, how can acts or conduct be so? And what do I add to my statement as to quality by producing a sample? There is no reason to suspect intentional deceit in either case. That a statement is untrue goes but a little way to prove lying. For one fact we know there are a million we assume we know, and yet know nothing in that sense that makes an untrue statement a lie. The merchant that shows a sample relies on a drawer of the sample, and he on a deputy, and he on the laborer that brings out the lot from which it is to be drawn.

The liability to make the statement good, if it is not true, is sufficient, for all practical purposes, to insure efforts to make it true. Under the Pennsylvania rule commerce could not exist. Probably no one engaged in commerce, properly so called, would dare invoke the rule. He would be driven from the haunts of men, — at least expelled from the Commercial Exchange.

In justice to the bar of the State it ought to be stated that this distinction between the language of pleading and that of evidence, and that this assumption in *Borrekens v. Bevan* was without foun-

dation and contrary to authority, was distinctly and admirably brought to the notice of the Court in *Fraley v. Bispham*, 10 Barr, 323, but with no other effect than to fasten the erroneous rule more firmly on our jurisprudence.

On two occasions the Legislature have been applied to for relief, and to put us on the level of civilized nations; but we could get no attention,—such subjects seemed to be beneath or above the statesmen who rule us.¹

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¹ At the last session the Legislature enacted that a sale by *sample* should create an implied warranty of correspondence of sample and bulk.